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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,

Petitioners,

v.

DAVID A. ROBBINS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONERS

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Cases (Cont.) **Page(s)**

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29 U.S.C. §213(a)(1). 6

Other Authorities **Page(s)**

R. Aldag & A. Brief, *Supervisory Style and Police Role Stress*, 6 Journal of Police Science and Administration 362, (1978) 12, 13

S. Alkus & C. Padesky, *Special Problems of Police Officers: Stress Related Issues and Interventions*, 11(2) Counselling Psychologist 55 (1983) 9, 13

Cobb & Rose, *Hypertension, Peptic Ulcer, and Diabetes in Air Traffic Controllers*, 224(4) Journal of American Medical Association 489 (1973) 10

G. Cooper, M Davidson, & P. Robinson, *Stress in the Police Service*, 24 Journal of Occupational Medicine 30 (1982) 10

Other Authorities (Cont.) **Page(s)**

F. Graf, *The Relationship Between Social Support and Occupational Stress Among Police Officers*, 14(3) Journal of Police Science and Administration 178 (1986). 10

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Petitioner Auer's arguments for reversal of the judgement in this case of the United States Court of Appeals for the Eighth Circuit which found that the Petitioners were not entitled under the federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.*, to overtime compensation for certain hours worked.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the St. Louis Police Fraternal Organization, and, at the time of the filing of this case, the St. Louis Police Officers Association, the recognized police labor bargaining agents for St. Louis Police Sergeants and Officers, respectively. NAPO represents law enforcement officers throughout the state of Missouri, the territory of the Eighth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 190,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process and workplace rights for law enforcement officers in the face of increasing political pressures for the cost-cutting, as well as the investigation and prosecution, both civil and criminal, of police departments and officers.

NAPO has an important interest in this matter, as the

case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United States will be entitled to receive the protections of the wage and hour provisions of the Fair Labor Standards Act. A clear enunciation of the scope and type of compensation which must be provided as a practical matter to officers in this situation is of tremendous importance to the constituent members of NAPO.

NAPO has received the written consent of Petitioners Francis Bernard Auer, *et al.*, and of Respondents David A. Robbins, *et al.*, to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The men and women who serve our society as law enforcement officers are today exposed to extremes of violence, human misery, depravity, poverty and suffering of innocents which is unimaginable to most persons and which were for the most part foreign to police work as it was even 30 years ago. With the possible exception of combat veterans, today's police officer sees, and feels, and hears and smells more carnage and trauma than any other professional.

The Fair Labor Standards Act of 1938 (hereinafter "the FLSA") seeks to prevent the working of excessive tours of duty by police by providing an economic disincentive for police employers who might otherwise be tempted to work officers to the point of exhaustion. This economic disincentive is contained in the overtime provisions of the FLSA. 29 U.S.C. §207. These FLSA provisions were designed to discourage excessive working hours while at the same time promoting fuller employment (it being less expensive to hire a new employee at regular pay than to utilize an existing one at "time-and-a-half").

Because the public relies so crucially upon law enforcement officers in our democratic republic, the public's welfare and safety is directly and indivisibly linked to the well-being of our police. If officers and sergeant are worked to the point of exhaustion, it is not only the officers or their partners who will suffer. Common sense argues that drowsy or fatigued officers will be more likely to commit errors and mistakes than well-rested colleagues. In a profession which calls for alertness, the ability to observe, critical reasoning and

judgement regarding the application of force even to the point of discharging a firearm, decreased awareness is a recipe for public disaster. Other professions upon which the public heavily relies for its safety are thoroughly regulated by the federal government with regard to the number of hours an employee may work in any given period of time. Because the public would be placed at least as greatly at risk by over-worked police officers as they would be by fatigued pilots, train engineers or truckers, the FLSA's protections should extend to police officers for the benefit of both officer and public alike.

ARGUMENT

I. LAW ENFORCEMENT OFFICERS "SUBJECT TO" NON-SAFETY DISCIPLINARY SUSPENSIONS FOR PERIODS OF LESS THAN A FULL WORK PERIOD ARE NON-EXEMPT HOURLY EMPLOYEES.

The scope of the Fair Labor Standards Act was meant to be extremely broad. Congress realized that in order to prevent circumvention of the rule most employees needed to fall under its coverage. "Breadth of coverage" is vital to [the Act's] mission." Powell v. United States Cartridge Co., 339 U.S. 497, 516 (1950). This is precisely why exemptions are to be read in the most narrow sense. When claiming an exemption to the Act "the employer has the burden of proof,. . . they must show that the employees fit plainly and unmistakably within [the exemption's] terms." Abshire v. County of Kern, 908 F.2d 483, 485-86 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991).

The major exemptions to the FLSA exist for bona fide executive, administrative, or professional employees. 29 U.S.C. §213(a)(1). The Secretary of Labor has broad power to define and limit these terms. Id. The Secretary has defined these exemptions in two ways. First, the duties of bona fide executive, professional and administrative employees are set forth in the Secretary's regulations executing the Act. See 29 C.F.R. §§541.1, .2, .3. Secondly, a bona fide professional, executive, or administrative employee must be paid a minimum weekly salary and must be paid it on a salary basis. See 29 C.F.R. §§541.1 (f), 541.2(e), 541.3(e).

An employee fails the salary basis test if pay penalties of less than a full pay period's salary are imposed upon the employee for reasons other than a major safety violation. 29 C.F.R. §541.118 (a)(5). The regulations state that these safety rules include "only those relating to the prevention of serious danger to the plant, or other employees." Id. The deductions in the case at bar did not fall within these exemptions.

The Department of Labor (DOL) prior to this case has also ruled that, even if no deduction has yet been made, as long as the employee is subject to a non-safety related disciplinary pay docking for periods of less than a full work period they are to be considered hourly employees who may not be exempted from FLSA coverage. The Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits have followed this practice and recognized the rule that an employer's policies making an employee's compensation "subject to" deduction and not actual deductions is determinative, and thus cause for denying an exemption. See Yourman v. Dinkins, 3 WH Cases2d 524 (2d Cir. 1996); Martin v. Malcom Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), cert. denied, 1135 S.Ct. 298 (1992); Balgowan v. New Jersey Dept. of Transportation, 1996 U.S.App. LEXIS 11353, 3 WH Cases2d 488 (3d Cir. 1996), petition for rehearing pending, (1996); Shockley v. New port News, 997 F.2d 18 (4th Cir. 1993); Michigan Association of Government Employees v. Department of Corrections, 992 F.2d 82 (6th Cir. 1993); Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), cert. pending, Case No. 95-586; Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 111 S.Ct. 785 (1991); Carpenter v. City of Denver, --- F.3d ---; [3 WH Cases2d 362] (10th Cir. 1996); Hibert v. District of Columbia, 23 F.3d 429 (D.C. Cir. 1993). In Martin, for example, the DOL

explained that its regulations provide that simply being "subject to" a docking is sufficient to prove hourly, rather than salaried status. Martin 949 F.2d 611 (2d Cir. 1991) cert. denied, 1135 S.Ct 298 (1992). The DOL particularly supported the Abshire court's adoption of a narrow reading of the exceptions to the salary basis rule:

> "The Abshire court reject[ed] defendant's argument that employees are salaried because no deductions were actually made . . . As the district court explicitly stated, 'it is the potential for reduction that destroys exempt status.'" Department of Labor Brief, Martin v. Malcom Pirnie, 949 F.2d 611 (2d Cir.), (No. 6138), cert. denied, 1135 S.Ct. 298 (1992) at 19-20 (emphasis in original) (see also p. 23 where DOL argues "subject to" cases are consistent with regulations).

As a result, if the Court follows the prior guidance of the DOL, being subject to a pay docking of less than one week will disqualify an employee from exempt status.

Any officer "subject to" pay docking should be considered an hourly employee. If the Court were to follow the opposing view that the docking must take place to revoke the exemption the result would be irrational. In effect the Court would be saying that in order to be eligible for hourly status, the employee would have to be first docked in (hourly) pay. This is not the type of incentive the Act was written to promote. The Court need only look to the DOL's previous regulations to see that an employee's being "subject to" pay

docking of less than a full pay period is contrary to the definitional status of an employee with an executive, administrative or professional exemption.

II. THE NATURE OF MODERN POLICE WORK MAKES IMPERATIVE THAT LAW ENFORCEMENT OFFICERS NOT BE SUBJECTED TO EXCESSIVE TOURS OF DUTY IN ANY GIVEN PERIOD OF TIME.

"An American law enforcement officer encounters more human tragedy in the first three years of his career than most of us see in a lifetime." E. Scrivner, *Psychological Reactions to the Use of Deadly Force*, Nat'l Sheriff Mag., Feb./Mar. 1985.

Police work embraces that which is most noble about the human condition. It extols service to others; it values protection for the weak; it commits itself to justice and it rewards bravery and sacrifice. At the same time, however, that we demand that our police officers follow these lofty ideals, they often serve in the very abyss of human cruelty and depravity. No one knows better than a police officer the evil that men can do. The extent of man's capacity to do wrong is such that even a veteran of police work can be shocked by what he or she sometimes sees. And hears. And touches. Yet however strong the feeling of repulsion, however great the urge to flee or to ignore, the officer has sworn an oath to do his or her duty.

It is the officer who must try to revive the obviously dead infant. It is the officer who must deliver the terrible news

that a spouse has been killed. It is the officer who crawls into the canal to pull out the grotesquely disfigured body. It is the officer who holds and tries in vain to comfort the violated child. It is the officer who is so often despised by others simply because of the job he or she does. It is the officer who sacrifices so much of family life and relationships for "the Job". It is the officer who is so frequently the target of violence even unto death.

Because law enforcement officers face such daily tragedy, they are subjected to tremendous amounts of stress. In fact, many studies consider police work one of the most, if not the most, stressful occupation in the United States. Alkus and Padesky, *Special Problems of Police Officers: Stress Related Issues and Interventions*, 11(2) Counselling Psychologist 55-62 (1983). The causes of the stress extend far beyond the inherent danger of apprehending criminals. Excessive hours, unreasonable amounts of paperwork, organizational practices such as poor supervision and direction, and judgments offered by a hostile public are often cited by police officers as the causes of their stress. Graf, *The Relationship Between Social Support and Occupational Stress Among Police Officers*, 14(3) J. Police Science and Administration 178-186 (1986).

In many instances, even when an officer is working less than the FLSA's maximum allowable "straight time", the amount of stress reaches unhealthy proportions. It is generally accepted by the medical community that increased stress is associated with poorer physical and mental health. Numerous studies link the frustration caused by prolonged stress with increased heart rate and systolic blood pressure as well as

actual tissue damage. Cobb & Rose, *Hypertension, Peptic Ulcer, and Diabetes in Air Traffic Controllers*, 224(4) J. Amer. Med. Assoc. 489 (1973). "Such stress-related health problems, as judged by morbidity and mortality figures, occur more with police officers as a group than most other occupations. Alkus at 55. Even more disturbing is the fact that the suicide rate for police was approximately twice that for lawyers and judges (two high risk groups) and that the death rate from cardiovascular disease was also significantly higher. Singleton & Teahan, *Effects of Job-Related Stress on the Physical and Psychological Adjustment of Police Officers*, 6 J. Police Science and Administration 355 (1978).

It appears that sergeants are particularly susceptible to the effects of stress. They often work long hours and are saddled with a heavy workload. Cooper, Davidson, and Robinson, *Stress in the Police Service*, 24 J. Occup. Med. 30-36 (1982). Many departments, in an attempt to avoid paying overtime to patrol officers (hourly workers), force sergeants (salaried employees) to shoulder the excess work. In many instances the excess is significant. Such practices not only hurt the force, but also circumvent the purpose of the FLSA which is a equitably shorter uniform hour standard for law enforcement.

The toll of stress unfortunately is not limited to physical ailments. The tribulations of police work also exact a psychological toll on the officer. Extended exposure to stress causes the officer difficulties both on the job and at home. Over time, a officer working in such a constantly stressful situation may begin to distrust and even dislike the people he or she is sworn to serve and protect, and even wishing they

would "get out of my life". Maslach and Jackson, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979). This response is a protective device: it reduces emotional attachment and thus stress, but also has the consequence of seriously impairing the officer's quality of human contact both on and off the job. Id. This is a serious problem in a field that deals with the public by definition. The result of burnout on a given department can range from low morale and performance to absenteeism and high job turnover. In any event, it is clear that the result is not a positive one.

An officer greatly affected by stress transfers his or her distant nature to his or her homelife. "In the high-burnout cop's family (assuming a male officer), the children are four times as likely to look exclusively to their mother for support. The man is twice as likely to report feeling distant from the children. The alienation between the officer and the children is often mirrored between the officer and the spouse." Id. A major problem is that the officer won't tell his or her spouse about the daily stress of the job, either to protect the spouse, or just as likely to avoid reliving the stress himself. As one officer stated, "The stress of the job is so bad sometimes, [one officer] said, that he stays an extra hour at work, just to cool down, before going home. 'A lot of times, I don't tell my wife everything, the most dangerous parts,' he said." P. Reardon & M. O'Connor, *Police Tactical Teams Tempt the Fates Daily*, Chicago Tribune, Jan. 9, 1991, at 1-2.

It is obvious not only to medical experts but even to the casual observer that long hours of stressful duty have a negative effect. Congress has also recognized the need for limited work hours for police. As the developmental history of

the FLSA has demonstrated, one of the primary factors in reducing law enforcement work hours to their present level was the concern that working longer hours than those prescribed would have a detrimental effect on the officer, both on the job and at home. It seems clear, then, that the number of maximum allowable "straight-time" hours set forth in the public safety worker provisions of the FLSA was selected for the specific protection of police workers and should thus be strictly observed.

III. THE WELFARE AND SAFETY OF THE PUBLIC DEPENDS UPON POLICE OFFICERS NOT BEING COMPELLED TO WORK EXCESSIVE HOURS.

The stress associated with an officer's job also affects his or her interactions with the public. Excessive stress is has been shown to bring about low work motivation which is associated with poor quality and quantity of work. Aldag, *Supervisory Style and Police Stress*, 6 J. Police Science and Administration 362-67 (1978). Excessive hours and the stress associated with them produce in officers attitudes of defensiveness, suspiciousness, and the feeling that outsiders do not understand police problems. Singleton at 359. Such attitudes have been shown to create classic "fight or flight" responses in officers. Alkus at 58. Fight or flight is characterized by officers who, when confronted with a situation requiring active intervention, react with either overzealous or avoidance behavior. In either case the response is not conducive to appropriate police work.

Out of the two responses, overzealousness is more

prevalent. It is also a more dangerous response both for the officer and the public. Overzealousness due to prolonged stress is often typified by risk-taking behavior by the officer, such as entering a home without assessing the danger or forgetting to call for backup. Alkus at 59. It has been hypothesized that possession of the above attitudes increase the probability that an officer will be involved in an injurious physical attack with possible lethal or near lethal consequences to self, partner, or suspect. Singleton at 359. In fact, many instances of excessive force used against suspects are manifestations of prolonged stress and overwork. Alkus at 59.

The second response to prolonged stress is avoidance. Simply put, this behavior is exhibited where officers take actions to reduce or completely avoid stress. Avoidance is illustrated through the deferring of decisions, ignoring the wishes of subordinates and peers in strict deference to those of superiors, becoming overly formal in relations with others, resorting to deceptive practices, or by the adoption of any number of avoidance mechanisms. Aldag at 367. The result is an officer who, instead of attempting to improve his or her performance and that of those surrounding him or her, is seeking to just go through the motions to the detriment of the public.

As has been clearly displayed the effects of stress associated with long hours of police work are not limited only to the officer but impact the public as well. An officer suffering from stress induced overzealousness subjects the public to a greater risk of injury due to either the officer's increased risk taking or use of excessive force. On the other hand, the public also suffers at the hands of officers plagued

with an avoidance disorder. This type of officer will refrain from acting on the public behalf unless action is totally unavoidable. In order for police to continue to serve the public interest to the fullest degree stress must be reduced through strict adherence to the FLSA's economic restrictions on maximum allowable hours for police employees.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court reverse the judgement in this case of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted this 22nd day of August, 1996,

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